WATTS v. WATTS' EX'X.

June 28, 1905.

[51 S. E. 359]

USE AND OCCUPATION—PERSONS LIABLE—DE FACTO GUARDIAN—TENANTS IN COMMON—PARTITION—DIVISION—GIFTS—PRESUMPTIONS—USE AND OCCUPATION—CREDITS—SUPPORT.

1. Where, in a suit to recover rents and profits of land occupied by defendant after a conveyance of a portion thereof by plaintiff's father, it appeared that defendant's son only assisted her in running the farm, their occupation being subservient to hers, they were not liable to plaintiff for use and occupation.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Use and Occupation, secs. 17, 18.]

2. After the death of plaintiff's mother, seised of an undivided interest in a farm, leaving plaintiff, and his brother who died soon after, her sole heirs, plaintiff's father married defendant, and thereafter conveyed the land to her, and she occupied and used the same after such conveyance as her own until the death of plaintiff's father. *Held*, that plaintiff's father and defendant, from the death of his mother and from the date of the conveyance by the father to defendant, respectively, were plaintiff's *de facto* guardians, and, having received the rents and profits from plaintiff's share of the land, were liable to account therefor, with compound interest thereon during the period each enjoyed the whole estate.

3. Plaintiff's father and stepmother were not plaintiff's tenants in common only liable to account in accordance with Code 1887, sec. 3294 [Va. Code 1904, p. 1735], providing that an action of account may be maintained against the personal representative of any guardian, and also by one tenant in common or his personal representative against the other as bailee, for receiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common.

4. Where plaintiff was entitled to an undivided interest in a certain farm as heir of his deceased mother, it was not material to the liability of the estate of his father and of his stepmother for rents and profits of plaintiff's interest during the time they occupied the same that such interest was not ascertained nor partitioned.

5. Where, in partition of a certain farm containing 494 acres, plaintiff was awarded 284 acres with the improvements, plaintiff, in a suit against his *de facto* guardians for an accounting of rents and profits, was entitled to the annual rental value of the part set off to him, and not to 284-494 of the annual rental value of the whole farm.

6. Where plaintiff's father was indebted to him at the time he placed a certain sum of money in a bank to plaintiff's credit, it will be presumed, in the absence of clear and convincing evidence, that the deposit was intended as a payment on the debt, and not as a gift.

7. Where plaintiff's father had possession and used an entire farm after the death of his wife, from whom plaintiff inherited an interest therein, the father's estate was not entitled to credit for support and maintenance rendered to plaintiff, as against his father's liability to account for rents and profits derived from plaintiff's interest in the farm.

8. Where, after the death of plaintiff's mother, from whom plaintiff acquired an interest in a farm, his father conveyed his remaining interest to plaintiff's stepmother, who thereafter had possession of the entire farm and supported the family, the father being insolvent, she was entitled to credit for support and maintenance afforded to plaintiff, as against her liability to account for rents and profits of plaintiff's interest in the farm.

VIRGINIA IRON, COAL & COKE CO. v. LORE.

June 22, 1905.

[51 S. E. 371.]

MASTER AND SERVANT—DEATH OF SERVANT—RULES—FAILURE TO PROMULGATE—FAILURE TO WARN—NEGLIGENCE—EVIDENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

1. In an action for death to a servant, evidence *held* to sustain a finding that defendant was guilty of negligence in failing to promulgate rules for the protection of decedent, and, in the absence of rules, in not warning him of the danger attending his work from the use of defendant company's yard by the railroad company.

2. Where, in an action for death of a servant in collision between a railroad train operating in defendant's yard and defendant's dinkey engine and slag pot, defendant's engineman testified that it was his habit to leave a switch open when he went out with slag, and to close it when he returned to the main track, whether the leaving of such switch open, in the absence of any rule on the subject, was contributory negligence, was for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, secs. 1089-1132.]